(2)

No. 04-668

FILED
JAN 19 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

DENNIS MCBRIDE AND ROBERT O'MARA,

Petitioners,

v.

JOSE ORTIZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, PENNSYLVANIA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a), prescribes a "total exhaustion" rule that requires a federal district court to dismiss without prejudice a prisoner's action challenging prison conditions if the complaint contains both exhausted and unexhausted claims.

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INTEREST OF *AMICI CURIAE*

Under the Prison Litigation Reform Act (PLRA), an inmate must exhaust his administrative remedies before filing suit. *Porter v. Nussle*, 534 U.S. 516 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). The *amici* States strongly support Petitioners' argument that 42 U.S.C. § 1997e(a) of the PLRA contains a total-exhaustion rule that requires dismissal without prejudice of an inmate's entire suit if it contains both exhausted and unexhausted claims.

The *amici* States and their correctional employees are subject to thousands of inmate lawsuits annually. In 2003 nationwide, prisoners brought more than 22,000 prison-condition and civil-rights suits against *amici* States and state correctional officials. *See* Administrative Office of the U.S. Courts, *Judicial Facts and Figures*, Table 2.9 (2003), http://www.uscourts.gov/judicialfactsfigures/table2.09.pdf. In 2003, prison-conditions and prisoner-civil-rights cases comprised nearly ten percent of all federal civil filings, outnumbering every other category including habeas filings. *See* Administrative Office of the U.S. Courts, *Judicial Facts and Figures*, Table 2.2 (2003), http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf. Because of these staggering numbers and the need to preserve the *amici* States' resources, the *amici* States are interested in this Court granting review of the petition to resolve the total-exhaustion question under the PLRA.

The *amici* States are also interested in this Court granting review to resolve the conflicting decisions on the total-exhaustion rule. *Compare* Pet. App. 1a-31a (the Second Circuit holding that there is no total-exhaustion rule) *with Ross v. Bernalillo*, 365 F.3d 1181 (10th Cir. 2004) (holding that there is a total-exhaustion rule);

Graves v. Norris, 218 F.3d 884 (8th Cir. 2000) (same); *see also Kozohorsky v. Harmon*, 332 F.3d 1141 (8th Cir. 2003) (holding that district court should have considered the inmate's motion to amend the complaint so he could drop his unexhausted claim).

The *amici* States are further interested in this Court granting review because the total-exhaustion rule requiring dismissal without prejudice of an entire action with both exhausted and unexhausted claims will allow for more-efficient and streamlined litigation. In many cases filed against the *amici* States and state correctional officials, the action contains multiple claims with interrelated and interconnected legal and factual allegations spanning multiple dates and against multiple parties. The total-exhaustion rule will ensure that the *amici* States have an opportunity to address all of an inmate's grievances internally before the inmate files suit. It will ensure that *amici* States can take corrective action for all interrelated and interconnected factual circumstances, thereby obviating the need for litigation. And it will ensure that cases ultimately brought to court have a full and complete administrative record of all claims.

ARGUMENT

I.

REVIEW SHOULD BE GRANTED TO RESOLVE THE SPLIT AMONG THE CIRCUITS AND TO DISPEL THE CONFUSION THROUGHOUT THE FEDERAL JUDICIARY ON THE TOTAL-EXHAUSTION RULE.

The PLRA's exhaustion requirement bars an inmate from filing a civil suit concerning prison conditions unless he has first exhausted his administrative remedies:

> Applicability of administrative appeals. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). This exhaustion requirement is mandatory, a "prerequisite to suit." *Porter*, 534 U.S. at 524; *Booth*, 532 U.S. at 741. As such, it is an "invigorated" form of the previous limited exhaustion requirement, which mandated exhaustion only when a court believed it to be "appropriate and in the interests of justice." *Porter*, 534 U.S. at 523-24.

Notwithstanding this invigorated exhaustion requirement, the federal judiciary is split on how to address a mixed action containing both exhausted and unexhausted claims. The *amici* States submit that § 1997e(a) requires that an inmate exhaust his administrative remedies for all claims before filing suit, and that the court dismiss without prejudice the entire action if the action contains both exhausted and unexhausted claims.

In the decision below, the Second Circuit held that when an inmate brings an action containing both exhausted and unexhausted claims, only the unexhausted claim need be dismissed. Pet. App. 1a-31a. The Second Circuit opined that the statutory language of § 1997e(a) is "too ambiguous" to answer the question whether Congress intended for the entire action to be dismissed. *Id.* at 14a-19a. It further held that dismissing an entire action would not help achieve Congress's goals of improving the quality of, or judicial efficiency in disposing of, prisoner suits. *Id.* at 19a-23a. Finally, it ruled that analogy to the habeas "total exhaustion" requirement under 28 U.S.C. § 2254 and as mandated in *Rose v. Lundy*, 455 U.S. 509 (1982), is misplaced. Pet. App. 23a-31a.

Conversely, the Eighth and Tenth Circuits have held that an inmate's entire action must be dismissed when it contains both exhausted and unexhausted claims. *Ross v. Bernalillo*, 365 F.3d 1181 (10th Cir. 2004); *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000).[1] In holding that there is a total-exhaustion rule, the Tenth Circuit in *Ross* relied on the statutory language of § 1997e(a), the total-exhaustion rule in the habeas context under 28 U.S.C. § 2254, and policy considerations – which include encouraging inmates to make full use of the prison's grievance process in order to give prison officials the first opportunity to address inmate complaints, creating an administrative record, relieving

[1] *But see West v. Kolar*, No. 03-6265, 2004 U.S. App. LEXIS 17102 (10th Cir. Aug. 17, 2004) (holding in a non-binding, unpublished decision, that the district court could either dismiss the entire action or allow the inmate to dismiss voluntarily his unexhausted claim); *Kozohorsky v. Harmon*, 332 F.3d 1141 (8th Cir. 2003) (holding that district court should have considered the inmate's motion to amend the complaint so he could drop his unexhausted claim).

district courts of having to determine whether exhausted claims are severable from unexhausted claims, and avoiding piecemeal litigation. *Ross*, 365 F.3d at 1188-90. The Tenth Circuit held that "the language in § 1997e(a) itself suggests a requirement of total exhaustion because it prohibits an 'action' (as opposed to merely preventing a 'claim') from proceeding until administrative remedies are exhausted." *Ross*, 365 F.3d at 1190. Similarly, the Eighth Circuit held that "the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Graves*, 218 F.3d at 885.

Other circuits, while not addressing the question head on, have impliedly rejected a total-exhaustion requirement. For instance, the Seventh Circuit in *Dixon v. Page*, 291 F.3d 485, 489-90 (7th Cir. 2002), without analyzing the total-exhaustion rule, allowed exhausted claims to proceed after dismissing the unexhausted claims.

Given the circuit conflict, it is not surprising that there is confusion among the district courts whether to apply the total-exhaustion rule. Some courts dismiss an entire action when there are both exhausted and unexhausted claims; other district courts do not follow the total-exhaustion rule and only dismiss the unexhausted claims. *Compare, e.g., Chamberlain v. Overton*, 326 F. Supp. 2d 811 (E.D. Mich. 2004) (finding that the total-exhaustion rule applies); *Mubarak v. Cal. Dep't Corrs.*, 315 F. Supp. 2d 1057 (S.D. Cal. 2004) (same); *Carrion v. Wilkinson*, 309 F. Supp. 2d 1007 (N.D. Ohio 2004) (same); *Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (same); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258 (D. Haw. 2000) (same); *with, e.g., Blackmon v. Crawford*, 305 F. Supp. 2d 1174 (D. Nev. 2004) (finding that the total-exhaustion rule does not apply);

Alexander v. Davis, 282 F. Supp. 2d 609 (W.D. Mich. 2003) (same); *Johnson v. True*, 125 F. Supp. 2d 186 (W.D. Va. 2000) (same); *Cooper v. Garcia*, 55 F. Supp. 2d 1090 (S.D. Cal. 1999) (same).

As these cases demonstrate, there is no consistent approach among the courts for addressing prisoner actions containing both exhausted and unexhausted claims. Thus, the *amici* States respectfully request that the Court grant Petitioners' request for review to resolve this split among the Circuits.

II.

THE CONGRESSIONAL POLICIES BEHIND THE PLRA MANDATE A TOTAL-EXHAUSTION RULE.

Before the enactment of the PLRA, an inmate was "well advised to take advantage of internal prison procedures for resolving inmate grievances," because the administrative process not only produced faster results but also aided the inmate's suit. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Now, under the PLRA, Congress compels inmates to pursue administrative remedies. 42 U.S.C. § 1997e(a). As the Court held in *Porter v. Nussle*, this mandatory rule is meant to decrease the burden of prisoner suits on the judiciary and allow prison administrators a full opportunity to address complaints internally before being drawn into court:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances,

> corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. . . . In other instances, the internal review might "filter out some frivolous claims." . . . And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Porter, 534 U.S. at 524-25 (citations omitted). These goals cannot be accomplished by allowing one exhausted claim to go forward and dismissing the unexhausted claims. Such a practice obviates inmates' incentives to ensure that each of their claims is exhausted before filing suit, ultimately neither reducing the quantity nor improving the quality of prisoner suits. *See id.* at 524.

In addition, as this Court held in the analogous habeas exhaustion context under 28 U.S.C. § 2254, "[r]equiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." *Rose v. Lundy*, 455 U.S. 509, 519 (1982). "To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review." *Id.* at 520. The same policy considerations hold true in a prison civil rights matter containing both exhausted and unexhausted claims.

Dismissing an unexhausted civil suit also advances the goal of judicial efficiency. Once it has been determined

that one claim is unexhausted, it is then unnecessary for the court to review each claim to determine exhaustion. On the other hand, the claim-by-claim procedure has no downside for the inmate because he will be able to file a complaint with exhausted and unexhausted claims without regard for the claims' exhaustion status, and leave the matter for the court to decipher. The total-exhaustion rule would impose responsibility on the inmate to attempt to exhaust all claims before filing suit, rather than placing the burden on the court.

Requiring dismissal without prejudice of a mixed action containing both exhausted and unexhausted claims also reduces the burden placed on the defendant prison officials. A significant onus currently falls on defendant prison officials in those circuits where the PLRA's exhaustion requirement is a defense that defendants must raise and prove, rather than a pleading requirement for the prisoner. *See, e.g., Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003). For instance, in the Ninth Circuit, the defendants must file an unenumerated Rule 12(b) motion to dismiss an action in which the inmate failed to exhaust his administrative remedies. *Id.* at 1119-20. Any one prison suit may contain both exhausted and unexhausted claims. Dismissal without prejudice of mixed actions would lessen such defendants' burden because if they find one unexhausted claim, they are relieved from having to parse through the often numerous remaining claims.

Congress's goals, including reducing the quantity and enhancing the quality of prisoner suits, can only be reached through a total-exhaustion rule. Thus, the *amici* States respectfully request that the Court grant Petitioners'

request for certiorari on the issue of total exhaustion under § 1997e(a).

CONCLUSION

The *amici* States respectfully request that the Court grant Petitioners' writ of certiorari.

Dated: January 19, 2005.

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